The Committee on Energy and Commerce

Internal Memorandum

June 1, 2011

TO: Members, Subcommittee on Oversight and Investigations

FROM: Subcommittee on Oversight and Investigations Staff

RE: Hearing on "The Views of the Administration on Regulatory Reform: An Update"

On Friday, June 3, 2011, at 9:30 a.m., in room 2123 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing entitled "The Views of the Administration on Regulatory Reform: An Update." The hearing will examine the manner in which the Office of Information and Regulatory Affairs (OIRA) is implementing Executive Order 13563 that President Barack Obama issued on January 18, 2011, entitled "Improving Regulation and Regulatory Review." This hearing follows up on a January 26, 2011, Oversight and Investigations Subcommittee hearing which involved a preliminary investigation of Executive Order 13563, its potential effect on the federal regulatory landscape, and the costs of regulations to American businesses.

I. BACKGROUND

a. White House Regulatory Reform Initiatives Since OIRA's Founding

OIRA is responsible for reviewing the substance of certain proposed and final rules before agencies publish those rules in the *Federal Register*. OIRA is located within the Executive Office of the President and "is the President's direct representative in the governmentwide rulemaking process."[1] Since OIRA's creation, each President has issued an Executive Order addressing OIRA's role in the review of agency regulations. One year after the enactment of the Paperwork Reduction Act (PRA), President Reagan issued Executive Order 12291, "Federal Regulation."[2] Executive Order 12291 required covered agencies, including Cabinet departments and some independent agencies, to engage in a cost-benefit analysis of proposed agency regulations. President Clinton issued Executive Order 12866, "Regulatory Planning and Review," on September 30, 1993.[3] This executive order replaced Executive Order

[1] U.S. Congressional Research Service. Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs (RL32397; Jan. 26, 2010), by Curtis W. Copeland, at 27.
[2] Executive Order 12291, "Federal Regulation," 46 Federal Register 13193, Feb. 19, 1981.
[3] Executive Order 12866, "Regulatory Planning and Review," 58 Federal Register 51735, Oct. 4, 1993.

12291 and is still in effect, as affirmed by President Obama's Executive Order as well as an earlier March 4, 2009, memorandum from Director of the Office of Management and Budget, Peter Orszag, to the heads and acting heads of executive departments and agencies.[4]

While Executive Order 12866 continued some of the requirements of Executive Order 12291[5], it limits OIRA review to only those agency regulatory actions that are determined to be "significant" by either the agency or OIRA.[6] In contrast to President Reagan's Executive Order, which directed agencies to refrain from taking regulatory action "unless the potential benefits to society for the regulation outweigh the costs to society," Executive Order 12866 directs the agencies to assess the costs and benefits, and states that an agency can move forward with the proposed regulation if it has made a "reasoned determination that the benefits of the intended regulation *justify* its costs" – a lower threshold. Section 5 of Executive Order 12866 requires agencies to submit a program detailing how the agency will review its existing "significant" regulations with a view towards eliminating or modifying unjustified or unnecessary regulations and ensuring that regulations are consistent with one another as well as with the President's priorities. Executive Order 12866 also includes provisions intended to increase transparency and public participation in regulatory review. It is important to note that OIRA's authority under Executive Order 12866 to review "significant" agency regulatory actions does not extend to the regulatory actions of "independent regulatory agencies" as defined by the PRA, although it does provide for some oversight by OIRA of these agencies' plans.

b. January 26, 2011 Hearing on Executive Order 13563

On January 18, 2011, President Obama issued an Executive Order entitled "Improving Regulation and Regulatory Review" (the "2011 EO"), as well as two related memoranda setting out the manner in which that review should be implemented.[7] The 2011 EO affirms the principles previously set forth in President Clinton's Executive Order 12866. In particular, it states that agencies must adopt only those regulatory actions whose benefits justify its costs; that are tailored to impose the least burden on society, that take into account the cost of cumulative regulations; that maximize net benefits; that specify performance objectives; and that evaluate

---

[4] For a copy of the March 4, 2009 memorandum, see http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

[5] Under Executive Order 12866, agencies were still required to submit proposed and final rules for OIRA review, just as they were under Executive Order 12291. In addition, agencies must prepare a cost-benefit analysis for "economically significant" rules, which is defined much like "major" rules in Executive Order 12291.

[6] Under the order, a "significant regulatory action" is one that: (1) has an "annual effect on the economy of $100 million or more or adversely effects in a material way" the economy, jobs, public health or safety, and State, local, or tribal governments; (2) creates a "serious inconsistency" with agency actions or planned actions; (3) materially alters the budget impact of entitlement programs or rights of their recipients; or (4) raises "novel legal or policy issues."

[7] For a copy of the Executive Order, see http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order. For a copy of the memoranda, see http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-flexibility-small-business-and-job-cre and http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-compliance.

alternatives to direct regulation. The 2011 EO also requires that agencies conduct a retrospective analysis of existing rules. Under the 2011 EO, as with Executive Orders 12291 and 12866, independent regulatory agencies such as the Federal Communications Commission, the Federal Trade Commission, the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, and the Nuclear Regulatory Commission are not subject to OIRA regulatory review, although they are "encouraged" to give consideration to the 2011 EO's provisions, consistent with their legal authority, and to consider undertaking, "on a voluntary basis," retrospective analysis of existing rules.

On January 26, 2011, the Subcommittee on Oversight and Investigations hosted Cass Sunstein at a hearing which examined the Administration's record on regulatory review in its first two years, and the manner in which President Obama's executive order could potentially improve the regulatory review system so as to reduce burdens on American businesses, if instituted properly. At the hearing, Mr. Sunstein affirmed that the Administration was commited to serious regulatory reform and stated that the 2011 EO was designed to supplement and improve the process inherited from previous administrations. Mr. Sunstein committed to keeping the Subcommittee updated on the progress of OIRA's regulatory review efforts, including returning to testify at a later date.

c. Developments in Obama Administration Regulatory Review since January 26, 2011

In a February 2, 2011, memorandum to the heads of executive departments, agencies, and independent regulatory agencies, Mr. Sunstein offered direction on the principles and requirements contained in the 2011 EO.[8] This included guidance on how these departments and agencies were to carry out the requirement that they each perform a retrospective analysis of existing rules. Pursuant to the 2011 EO, within 120 days of its issuance, agencies were required to submit to OIRA a "preliminary plan" laying out how each agency intended to review its existing "significant" regulations and determine which ones should be modified or repealed. In an April 25, 2011, memorandum to the heads of executive departments and agencies, Mr. Sunstein offered guidance on the processes through which the preliminary plans will become finalized.[9] Among other goals, the memorandum encourages agencies to make their preliminary plans available to the public within a reasonable period (not to exceed two weeks) after May 18, 2011, so as to promote a period of rigorous public consultation before plans are finalized. On May 26, 2011, the White House released to the public 30 agency plans, including those prepared by the Department of Commerce, the Department of Energy, the Department of Health and Human Services, and the Environmental Protection Agency.[10]

[8] For a copy of the February 2, 2011 memorandum, see http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.
[9] For a copy of the April 25, 2011 memorandum, see http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf.
[10] For copies of the plans, see http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.
.

II. WITNESS

The Administrator of OIRA, Cass R. Sunstein, will testify at the hearing. Administrator Sunstein was confirmed by the Senate on September 10, 2009.

Before becoming Administrator, Mr. Sunstein was the Felix Frankfurter Professor of Law at Harvard Law School. Mr. Sunstein graduated in 1975 from Harvard College and in 1978 from Harvard Law School magna cum laude. After graduation, he clerked for Justice Benjamin Kaplan of the Massachusetts Supreme Judicial Court and Justice Thurgood Marshall of the U.S. Supreme Court, and then he worked as an attorney-advisor in the Office of the Legal Counsel of the U.S. Department of Justice. He was a faculty member at the University of Chicago Law School from 1981 to 2008. A specialist in administrative law, regulatory policy, and behavioral economics, Mr. Sunstein is the author of many articles and a number of books, including After the Rights Revolution (1990), Risk and Reason (2002), Laws of Fear: Beyond the Precautionary Principle (2005), Worst-Case Scenarios (2007), and Nudge: Improving Decisions about Health, Wealth, and Happiness (with Richard H. Thaler, 2008).

Additional witnesses may be called at the discretion of the Majority.

III. ISSUES

The following issues will be examined at the hearing:

- More than 120 days after Executive Order 13563 was issued, what is the Administration's experience with improving regulation and regulatory review?
- What has OIRA learned since January 18, 2011, that bears on the effectiveness and/or long-term implications of Executive Order 13563 for formulating smarter, more targeted and less-costly regulations going forward?
- Are the chances of achieving a "consistent culture of retrospective review and analysis throughout the executive branch"[11] greater today than they were on January 17, 2011?

IV. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Sam Spector (samuel.spector@mail.house.gov) or John Stone (john.stone2@mail.house.gov), with the Subcommittee on Oversight and Investigations staff at (202) 225-2927.

[11] For a copy of the February 2, 2011 memorandum, see http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf.